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# The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty

*Tobias Kelly\**

### ABSTRACT

Focusing on the Committee Against Torture, this article argues that human rights monitoring can hide as much as it reveals. In particular, monitoring should be understood as a “second order” process that displaces the discussion of the causes and consequences of violence in favor of a focus on the systems that are supposed to monitor cruelty. In this process, measurements, monitoring, and prevention are in danger of becoming merged. As such, the ways in which the Committee Against Torture produces and assesses information serves simultaneously to create a depoliticized conception of violence and to reproduce political inequalities between states.

### INTRODUCTION

Torture is perhaps the most widely prohibited of all human rights violations and has a significant place in virtually every major international human rights instrument. At the heart of the international prohibition of torture lies the UN Committee Against Torture (“the Committee”), which is charged with

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monitoring compliance with the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). The work of the Committee plays an important role in defining torture and ensuring that states comply with CAT. As with the other UN human rights committees, however, it lacks the means of enforcement. Instead, the Committee reviews reports from states, alongside information from NGOs and other international bodies, and then issues non-binding recommendations. As such, the Committee is best understood as a form of knowledge production. Based in tranquil Geneva, it sorts, prioritizes, and distinguishes between vast amounts of information.

The recognition of torture presents unique challenges. Torture's particular stigma, as one of the most universally recognized violations of human rights raises the stakes for those states accused of torture. Very few, if any, states willingly admit that they participate in torture. Furthermore, despite its apparent moral absolutism, torture remains a notoriously slippery category to define because its meaning constantly shifts under pressure. Finally, the overwhelming pain of torture, and the often subtle ways it is administered, can block forms of communication, which in turn creates doubt about torture's very existence in any given case.<sup>1</sup> Any attempt to recognize torture must therefore overcome serious political, legal, and epistemological hurdles.

This article turns the ethnographic gaze on the human rights monitoring process, in order to determine the forms of knowledge that human rights monitoring produces about cruelty and suffering. Although monitoring lies at the heart of the UN human rights system, the specific nature of the monitoring process has often been taken for granted and its content seen as self-evident in the wider debates over enforceability and political reform. However, monitoring is not merely a technical process of information gathering, but is suffused with normative assumptions about forms of accountability and responsibility. Monitoring can be understood as having at least two main two goals. The first is to monitor compliance with a UN convention. The second is to promote the human rights contained in a given convention. As such, in the first place the practices and procedures of torture prevention have to be made "monitorable" and amenable to particular forms of assessment. Surfaces have to be created from which information can be read. Human rights indicators, in the shape of statistics, legislation, and codes of practice are much easier for the Committee to deal with than the often messy day-to-day reality of prison guarding or interrogation techniques.

Monitoring does not rely upon direct inspection, but instead relies on information one stage removed from the infliction of violence that is gathered by states, NGOs, and other parts of the United Nations, all of which has to

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1. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1986).

be evaluated by the Committee. It is therefore a second order process that does not simply reveal information, but abstracts and codifies it.<sup>2</sup> In a second step, as part of the task of prevention, Committee members also judge the risks presented by particular institutional arrangements. This judgment is an assessment of whether those specific arrangements are more likely to lead to torture or other forms of ill-treatment, for example. Monitoring therefore does not simply use evidence that is “out there,” but filters it through judgments about expertise, trust, and risk. However, in this process, discussion of the causes and consequences of violence is often displaced in favor of a discussion of the systems that are supposed to monitor cruelty.<sup>3</sup> Human rights indicators become confused with human rights and there is a slippage between the process of monitoring and the practices designed to prevent human rights violations.

The central argument of this article is that the merging of techniques of monitoring and visions of prevention reproduces a particular vision of the liberal nation-state. In doing so the Committee implicitly assumes that formally liberal institutions produce liberal practices throughout all levels of society and ignores the ways in which liberal politics can produce its own forms of violence. As a result, the monitoring process of the UN Committee Against Torture simultaneously creates depoliticized conceptions of violence and reproduces political inequalities between states. The Committee’s process of monitoring compliance with the prohibition against torture therefore does not simply produce transparent forms of knowledge, but can hide as much as it reveals, as the everyday practices and structural inequalities that produce torture are downplayed in favor of a focus on formal processes and procedures.

The argument presented below is based on ethnographic fieldwork at the 2006 and 2007 sessions of the Committee Against Torture. During this period the United States, Qatar, the Republic of Georgia, Togo, Ukraine, Denmark, Guatemala, Italy, Japan, Lichtenstein, the Netherlands, Peru, and Poland presented reports. Throughout this time, I attended the sessions of the Committee as well as interviewed Committee members, staff of the Office of the High Commissioner for Human Rights (OHCHR) Secretariat, and numerous NGO and state representatives. This fieldwork is supplemented by an analysis of the numerous reports produced by the state parties to the Convention, NGOs, and the Committee itself.<sup>4</sup>

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2. MICHAEL POWER, *THE AUDIT SOCIETY: RITUALS OF VERIFICATION* (1997).

3. *Id.*

4. Where not directly cited, quotations and comments in this article from Committee members, NGO representatives, UN civil servants and representatives of state parties come from interviews I conducted during this fieldwork, the notes of which are on file with the author.

## II. TORTURE, RECOGNITION, AND HUMAN RIGHTS

Despite the moral absolutism against torture, the concept itself remains notoriously vague. At the heart of the prohibition of torture lies a moral objection to suffering and pain. Yet, in medical terms there is no specific syndrome associated with torture victims. Rather, symptoms of torture victims can range from severe psychosis to mild nightmares.<sup>5</sup> The most widely accepted medical condition associated with torture victims, Post-Traumatic Stress Disorder (PTSD), also affects a much wider group of people than those who have been subjected to torture.<sup>6</sup> Furthermore, a diagnosis of PTSD does not capture the whole experience of torture survivors, who are often as concerned with access to housing, welfare, and employment as they are about medical treatment.<sup>7</sup>

One famous argument claims that the distinctive nature of torture lies in its ability to destroy the capacity to communicate.<sup>8</sup> However, the idea that the pain of torture is a fundamentally private experience denies the ways in which pain is itself a social relationship. As Veena Das argues, the statement "I am in pain" is a declarative statement that does not describe a state, but voices a complaint.<sup>9</sup> The task for academics, human rights activists and clinicians is therefore to create the conditions that allow the "private experiences of pain . . . to move out into the realm of publicly articulated experiences of pain . . . to create a moral community through the sharing of pain."<sup>10</sup> The problem of torture is therefore not one of the failure of language, but the failure of recognition. The issue is not that victims are unable to communicate their suffering, but that lawyers, doctors, and other practitioners find it difficult to recognize when and where torture has taken place. The ways in which legal processes produce or deny claims about torture is therefore a question of great importance.

An understanding of the concept of torture cannot be separated from the legal practices that have shaped its meanings and implications. Torture should be seen as a legal category, referring to specific forms of cruelty and suffering. More specifically, the category of torture is rooted in European legal reform of the seventeenth and eighteenth centuries.<sup>11</sup> The growth of

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5. See James Jaranson, *The Science and Politics of Rehabilitating Torture Survivors: An Overview*, in *CARING FOR VICTIMS OF TORTURE* 15 (James Jaranson & Michael Popkin eds., 1998).

6. Derek Summerfield, *A Critique of Seven Assumptions Behind Psychological Trauma Programmes in War Affected Areas*, 48 *SOC. SCI. & MED.* 1449 (1999).

7. DUNCAN FORREST & FRANÇOISE HUTTON, *GUIDELINES FOR THE EXAMINATION OF SURVIVORS OF TORTURE* (2000).

8. SCARRY, *supra* note 1.

9. VEENA DAS, *CRITICAL EVENTS: AN ANTHROPOLOGICAL PERSPECTIVE ON CONTEMPORARY INDIA* (1995).

10. *Id.* at 193.

11. JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* (1977); EDWARD PETERS, *TORTURE* (2d ed. 1996).

judicial torture in medieval Europe was not simply the product of arbitrary and capricious politics, but rather a desire to create legally reliable evidence. Similarly, the abolition of torture took place following the creation of forms of punishment, such as prisons, that unlike the death penalty did not seem to demand absolute levels of proof. The concept of torture has therefore developed not as a direct expression of human experience, but against the background of judicial reforms.

This connection between torture and legal reform does not mean that wider moral and sentimental definitions of torture are commonplace. Indeed the term torture is often applied to a range of activities that far exceed its narrow legal definition. It also does not mean that the legal concept of torture is unified or coherent. There are important and ongoing conflicts over the threshold of the severity of pain and cruelty, the role of intention, the identity of perpetrators, and the positive obligations of states to prevent torture. However, juridical institutions and legal forums remain the central place where the precise meanings of torture are debated and recognized. It is therefore necessary to explore how the production of legal knowledge about torture prioritizes particular forms of knowledge about cruelty and suffering over others. As part of this exploration we need to scrutinize the ways in which legal practices shape and produce, rather than simply distort understandings of suffering.<sup>12</sup> The task therefore is not to examine how the legal processes of recognizing torture sanitize subjective experiences, but rather to explore how the legal recognition of torture produces multi-layered, and often contradictory, forms of knowledge about suffering.

Human rights practices play a central role in the recognition of cruelty and suffering. However, UN human rights committees hold an ambiguous position in international law. Although they are at the center of the international human rights system, they lack the ability to determine issues of fact, or to issue legally binding decisions. Their uncertain status is often termed “quasi-legal” or “quasi-judicial.” This ambiguity is central to the forms of knowledge produced by the human rights monitoring system. The Committee Against Torture members, for example, operate in a grey area between fact and law because they are never entirely certain of the empirical ground upon which they stand, nor are they able or willing to make clear determinations on matters of legal doctrine. Furthermore, although the Committee members are supposed to monitor compliance, they do not have the resources to launch effective investigations.

In the face of this normative and empirical uncertainty, the Committee members regain a measure of stability through a general distinction between what are seen as culturally and institutionally developed and underdeveloped

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12. Compare Kirsten Hastrup, *Violence, Suffering and Human Rights: Anthropological Reflections*, 3 *ANTHROPOLOGICAL THEORY* 309 (2003).

states. The relative absence of torture is linked to “liberal” political institutions and values. States that fail to meet this idealized model, which in reality exists nowhere, are treated as pathological failures.<sup>13</sup> From the penal reformers of the eighteenth century, to the debates over the “war on terror,” the fight against torture has been associated with the values of a seemingly enlightened modernity.<sup>14</sup> The eradication of torture was a central part of the civilizing mission of the nineteenth and twentieth century.<sup>15</sup> More recently, the seeming tension between the use of torture and the purported “values of the civilized world” has been at the heart of debates over the meanings and implications of the war on terror.<sup>16</sup> In practice, the historical opposition between torture and states that claim to uphold the values of civilization is not self-evident.<sup>17</sup> However, at the levels of professed values and legal discourse within those nations at least, torture directly contradicts liberal modernity.

Given international law’s links to the values of “modernity” and “civilization,” it is perhaps unsurprising that recent work has also highlighted the ways in which international human rights law can reproduce global inequalities.<sup>18</sup> Such arguments have illuminated how colonial categories are re-inscribed into the practice of international law. Although these critiques are important, they are often based on the analysis of text or broad histories of international relations and diplomacy. As a result, they ignore the contradictory intentions and desires of the individuals and organizations through which human rights law is reproduced. For the UN Committee Against Torture, the reproduction of the divide between developed and underdeveloped nations is not a deliberate policy, but rather is a product of the political constraints faced by the Committee as well as its institutional weaknesses. The rest of this article, therefore, explores the ways in which international human rights law is produced in the context of cross cutting intentions and institutions, as people grapple with the difficult task of monitoring human rights compliance.

### III. THE UNITED NATIONS CONVENTION AGAINST TORTURE

CAT was adopted in 1984, and entered into force on 26 June 1987.<sup>19</sup> The United Nations created the Convention after intense lobbying by NGOs,

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13. Mark Duffield, *Social Reconstruction and the Radicalization of Development: Aid as a Relation of Global Liberal Governance*, 33 DEV. & CHANGE 1049 (2002).

14. Stanford Levinson, *Contemplating Torture: An Introduction to TORTURE: A COLLECTION* 23 (Stanford Levinson ed., 2004).

15. ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

16. Levinson, *supra* note 14.

17. DARIUS REJALI, *TORTURE AND DEMOCRACY* (2007).

18. ANGHIE, *supra* note 15.

19. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No.



most notably Amnesty International. As of April 2009, there are 146 state parties to CAT.<sup>20</sup> In its preamble the treaty declares its aim is “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.” Article 1 defines torture as any act that causes mental or physical pain that is inflicted in order to obtain information, a confession, or to coerce and intimidate. Importantly, the Convention’s definition of torture in Article 1 does not include “pain or suffering arising only from, inherent in or incidental to lawful sanctions.” The prohibition of torture is absolute. It has no exceptions for security reasons or otherwise, and Article 2 states that “[n]o exceptional circumstances whatsoever . . . may be invoked as a justification of torture.” The central principle behind the Convention is the prevention of impunity by ensuring that torture is effectively criminalized by member states.

The Committee was established by CAT in order to monitor compliance with the Convention.<sup>21</sup> The Committee is made up of ten members, elected every four years by the states that have ratified the Convention. Members are nominated by their states, but once they sit on the Committee they are supposed to act independently. The practice has been to have two South American, two African, three European, one North American, one Eastern European, and one Chinese member. Of the ten members in 2008, two worked in NGOs, three were diplomats, three worked in law schools, and two as judges.

By establishing a monitoring committee CAT mirrors other UN human rights treaties. As Roger Normand and Sarah Zaidi argue, signatory states were unable to agree on the precise powers of the UN human rights system from the outset, with the United States and USSR particularly keen to avoid any restrictions on sovereignty.<sup>22</sup> This disagreement resulted in a monitoring process with a deliberately restricted mandate. As with the other committees, the terms of reference for the Committee Against Torture leave considerable room for interpretation and contestation between states and the Committee members. As such, it is crucial to recognize that the roles and processes of the Committee are constantly changing. The Committee is not a functional product of international governance, or a direct response to international human rights violations. Rather, the practices of the Committee are frag-

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- 51, U.N. Doc. A/39/51 (1985) (*entered into force* 26 June 1987), *reprinted* in 23 I.L.M. 1027 (1984), *substantive changes noted* in 24 I.L.M. 535 (1985) [hereinafter CAT].
20. U.N. Treaty Collection, Status of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *available at* <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&id=129&chapter=4&lang=en>.
21. CAT, *supra* note 19, at arts. 17–18.
22. ROGER NORMAND & SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE (2008).



mented and conflicted because they are produced through the interaction of international diplomats, UN civil servants, and NGOs.<sup>23</sup>

To comply with their obligations under the Convention, state parties must submit an initial report one year after ratifying the Convention and a periodic report every four years thereafter. The Convention merely requires states to "submit to the Committee . . . reports on the measures they have taken to give effect to their undertakings under this Convention."<sup>24</sup> It does not detail the format of the reports, their length, or the forms of information required. Historically, there has been a wide variation in the reports sent to the Committee. The Committee does issue guidelines for the presentations of reports, but these are not always followed. In the late 1990s, the Committee also adopted the practice of sending a list of issues, essentially a request for further information after the periodic report had been submitted, six months prior to examining a state's report.<sup>25</sup> Additionally, in 2007, the Committee adopted a new procedure to send out an initial set of issues upon which the reporting state is asked to base its periodic report.<sup>26</sup>

As with the reporting process, the specific process through which reports are examined is not set out in the Convention. As of 2008, the Committee meets twice a year, once in May and once in November, for three and two weeks respectively. Reporting states have the opportunity to present their report, and then those states receive questions from the members. After questioning, the state has thirty-six hours to reply. After examination, the Convention enables the Committee to, "at its discretion, decide to include any comments."<sup>27</sup> CAT does not make these comments obligatory, nor does it set out their form. Over the years there has been much variation in what have come to be called "conclusions and recommendations." The very term "recommendation" is a discretionary insertion from the Committee and is not included in the text of the Convention. Originally, the conclusions were issued by individual members, not by the Committee as a whole. More recently the Committee has moved towards more systematic conclusions that include positive comments as well as subjects of concern. The Committee attaches distinct recommendations to each issue.<sup>28</sup>

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23. Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions*, 41 HARV. INT'L L. J. 529 (2000).

24. CAT, *supra* note 19, at art. 19 ¶1.

25. Committee Against Torture, Harmonized Guidelines on Reporting Under the International Human Rights Treaties, Including Guidelines on a Core Document and Treaty-Specific Documents, Extract of HRI/GEN/2/Rev.5, *available at* <http://www2.ohchr.org/english/bodies/cat/docs/HRI-CoreGuidelines-CAT.doc>.

26. Office of the United Nations High Commissioner for Human Rights (OHCHR), New Optional Reporting Procedure Adopted by the Committee Against Torture, *available at* <http://www2.ohchr.org/english/bodies/cat/reporting-procedure.htm>.

27. CAT, *supra* note 19, at art. 19 ¶4.

28. OHCHR, Committee Against Torture—Working Methods: Overview of the Working Methods of the Committee Against Torture, *available at* <http://www2.ohchr.org/english/bodies/cat/workingmethods.htm#a4>.

Alongside the formal Committee sessions, CAT establishes three parallel mechanisms.<sup>29</sup> The first is a system of complaints, known as communications, by private individuals about specific incidences of torture. States opt into this process and decisions are then communicated to the state and petitioner involved. The second is a “confidential inquiry” by one of the Committee members. Committee members have only employed this process in three cases (Brazil, Egypt, and Turkey). Finally, and perhaps most importantly, an Optional Protocol to the Convention (OPCAT) entered into force on 22 June 2006. OPCAT established a sub-committee in order to ensure a “system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.”<sup>30</sup> At the time of writing, the OPCAT process is in its initial stages and its direct relationship to the Committee is still largely undefined. The focus of this paper, then, is the state reporting process, as that remains the most comprehensive part of the monitoring process.

The general consensus amongst commentators, NGOs, and even many diplomats and UN employees is that the Committee is weak. Common complaints include the claim that the Committee’s members do not have the necessary levels of expertise to grasp complicated legal issues, and that they do not understand the implications of their formal independence. Academic writings also routinely describe the monitoring process as being in crisis.<sup>31</sup> However, it is important to note that although states complain about the Committee’s ineffectiveness, the design of the Committee and its membership is decided by the states themselves. As such, the limitations of the Committee should not be seen simply as a failure, but rather as the product of a deliberately restricted mandate. Realist critiques of the UN human rights system are liable to dismiss human rights monitoring as an unenforceable irrelevance. Recent work, however, has suggested that the influence of the various UN human rights committees is diffuse and indirect because their conclusions, recommendations, and communications take on a life of their own.<sup>32</sup> NGOs, courts, and even governments use the Committee’s recom-

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29. CAT, *supra* note 19, at arts. 20 ¶2, 22.

30. Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 18 Dec. 2002, G.A. Res. A/RES/57/199, U.N. GAOR, 57th Sess., art.1, U.N. Doc. A/RES/57/199 (2003) (*entered into force* 22 June 2006), *reprinted in* 42 I.L.M. 26 (2003).

31. Roland Bank, *Country-oriented Procedures Under the Convention Against Torture: Towards a New Dynamism*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 145 (Philip Alston & James Crawford eds., 2000); James Crawford, *The UN Human Rights Treaty System: A System in Crisis?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING*, *supra*, at 1.

32. SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE* (2006).

mendations in their own political struggles. Despite the many weaknesses and criticisms of its work, it is therefore important to understand the logic and structure of the specific forms of knowledge produced by the UN Committee Against Torture. The rest of this section will therefore examine the sources of information with which the Committee works.

### A. State Reports

The principal source of information for the Committee is the reports produced by each signatory state. Reports are meant to describe new measures and developments that relate to the implementation of the Convention since the last report. States are supposed to report every four years,<sup>33</sup> yet many of them do not do so, and several have not reported since ratifying the Convention. The Committee has no powers to force states to submit reports and according to one estimate over 70 percent of states have overdue reports.<sup>34</sup> For those states that do provide reports, they can refuse to answer the questions of the Committee, or answer in a way that obscures the situation on the ground.<sup>35</sup> For example, states often fill their written reports with long lists of legislation and formal policies, rather than concrete practices. Faced with these vast amounts of information, the Committee has to decide how much of it is reliable and how much of it is mere window-dressing.

However, the Committee has limited investigatory powers to supplement the information they receive from states. The Committee's financial and time resources are severely constrained. Members are unpaid and only work in Geneva for five weeks a year. The rest of the time they have other jobs. Although the Committee is supported by a secretariat drawn from the civil servants of the OHCHR, none of these civil servants works for the Committee full time. Some Committee members, especially those with NGO backgrounds, do carry out their own private visits, but do so out of their own funds and on their own time. The resources available to the Committee are far smaller than those available to any state so the Committee operates with an information deficit in relation to the states whose reports it examines.

### B. NGOs and the Committee

To a great extent, the Committee relies on information supplied by NGOs. As such, NGOs can play a central role in setting the Committee's agenda, the

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33. CAT, *supra* note 19, at art. 19 ¶1.

34. ANNE BAYESKY, THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS 7 (2001).

35. See MERRY, HUMAN RIGHTS AND GENDER VIOLENCE, *supra* note 32.

questions they ask, and eventually the recommendations that they make. Officially NGOs are only supposed to contact the Committee members through the Secretariat, but in practice they often do so independently, especially if they have an ongoing relationship with an individual member. The involvement of NGOs can begin up to a year prior to a state's session, when they meet the Committee's country rapporteurs and the OHCHR Secretariat in order to explain the key issues the Committee should address. Prior to the session, NGOs also normally submit written "shadow reports." The Committee Against Torture has probably formalized the participation of NGOs to a greater extent than any other part of the UN human rights system. For example, the Committee sets aside formal closed briefing sessions, complete with translators.<sup>36</sup>

Given the involvement of NGOs, the Committee often appears to be influenced by the information provided by NGOs. During state sessions members sometimes refer directly to information from human rights organizations, especially if the organization has a high international profile. More often than not, however, members simply quote from the NGOs reports, without indicating the source. It is possible to trace the issues raised in shadow reports and in NGO briefings to those that arise in the formal sessions. The World Organisation Against Torture (OMCT), for example, carried out a survey that found that in the reports in which it had engaged, between 18 percent and 53 percent of the recommendations produced by the Committee could be traced back to recommendations originally made by OMCT.<sup>37</sup>

Despite heavy NGO participation in general, there is often a disparity in the amount of information provided by NGOs on different states. Over fifteen NGOs submitted information for the US report, where as no organization did so for Qatar. Similarly, only one international NGO was present for the report from Togo. Smaller NGOs are also often confused by the rules of the Committee, which are slightly different from the other branches of the UN human rights treaty monitoring system and are also constantly changing as the Committee adjusts its procedures. The Committee also faces a particular problem in assessing the relative credibility of information produced by NGOs. The policy of accepting any submitted information creates a problem of whether to trust all of the information, and how much relative weight to give it. The Committee makes some attempt to check claims against press reports, national human rights ombudsmen, and information supplied by other UN organizations. To a large extent, however, the Committee members

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36. OHCHR, Participation of Non-Governmental Organizations (NGOs) and National Human Rights Institutions (NHRIs) to the Reporting Process to the Committee Against Torture, available at [http://www2.ohchr.org/english/bodies/cat/follow\\_up\\_ngo.htm](http://www2.ohchr.org/english/bodies/cat/follow_up_ngo.htm).

37. ORGANISATION MONDIALE CONTRE LA TORTURE, RAPPORT NARRATIF (2006) (on file with author).

can only rely on the relative reputation of the organization that submitted the information. As a result, the Committee tends to rely on the information supplied by the larger international NGOs.

Nearly all of the Committee members recognize that they could not do their work without the input of NGOs, and they depend on human rights organizations for their basic information.<sup>38</sup> However, the extent to which they are open to NGO involvement varies from member to member, and is often linked to whether the respective member has an NGO background. One Committee member, for example, who works for a psychosocial organization, told me that she found the involvement of NGOs in the process as one of its most refreshing features. Another, who worked as a diplomat, said that he thinks NGOs take up too much time. Some states also complain that NGOs are too influential in the process, and that they have not come to Geneva to have a discussion with a domestic NGO. In sum, while NGOs play a central role in the Committee's information gathering process, their position is contested by both states and Committee members.

### C. Gaps in Knowledge and the Monitoring Process

The Committee's information gathering about torture and compliance with CAT is marked by gaps, inconsistencies, and questions. Problems in the institutional capacity of the Committee, the lack of knowledge of its members, and its technical procedures contribute to the Committee's difficulty in assessing the information provided by any particular state as compared to the situation in reality. One particular problem is that there is a routine delay of two years between the report's submission and its being heard. Yet, if all the states that are supposed to send reports did so the delay would be much longer. An additional problem is that two yearly meetings for a total of five weeks is simply not long enough to process the large amounts of paperwork included in the reports. For example, for the US report, NGOs and the US delegation together submitted over 3,200 pages of documentation. This amount was abnormally high, but Committee members often complain that they do not have time to read all the documents for a particular session. Additionally, translation of the documents poses a problem. For the US report, for example, one of the two rapporteurs only worked in French. Although the initial US report, written in English, was translated into French, the written replies were not. The result is that large parts of the replies are not available to the Committee members who do not share the language of the written report.

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38. MERRY, HUMAN RIGHTS AND GENDER VIOLENCE, *supra* note 32, at 69.

The gaps and limitations in the knowledge produced by the Committee mean that it has to rely on information that is one step removed from the direct infliction of torture. Rather than direct observation it depends on secondary sources, above all states. As such, monitoring produces evidence that is not taken from the "scene of crime," but rather comes from secondary human rights indicators in the shape of claims about policies, institutional design, legislation, and statistics. The monitoring process, therefore, involves judgments about the risk, expertise, and trustworthiness of NGOs, and above all reporting states. At the level of information gathering, there is a movement towards a focus on procedures and principles, and at the level of assessment there is an implicit assumption that the institutions associated with liberal democracies are less likely to produce torture.

*1. As to the facts . . .*

The result of the Committee's restricted mandate and limited investigatory powers is that the Committee cannot and does not make factual determinations, or even firm allegations. As a result, the Committee members pose questions to reporting states that are highly qualified. Rather than making direct allegations, members ask states to comment on existing allegations. They use phrasing such as: "I have a feeling that . . .," "there are strong allegations that . . .," or "could you comment on . . ." Often members go so far as to admit they know relatively little about the situation in the state before them. During the session on Georgia, for example, the rapporteur said that he did "not know very much" about the country. In private, most Committee members admit that to a certain extent they defer to the state's claims. When disagreements over basic factual issues arise, the Committee is in no position to determine who or what is correct. The Peruvian delegation, for example, told the Chair that he was simply wrong to suggest that political prisoners might have been convicted by evidence obtained through torture, and that he should provide any names and dates to back up these allegations. In such conflicts the Committee does not determine who is correct, but either asks for more information or, more often than not, leaves the question open.

The inability to make factual determinations means that the Committee tends to focus on procedures and principles rather than on specific cases. The precise questions often vary according to the background of the members. The two members who are judges ask questions about the rule of law, whereas the two members with NGO backgrounds often ask about gender issues and children. In general, the questions either concern broad policies, institutional arrangements, or statistical clarifications. One of the Committee members, for example, complained to the Georgian delegation that there were no statistics on the number of calls to a hotline that was established to hear complaints of torture.

The polite tone and general nature of the questions makes them relatively easy for states to avoid answering. It is also difficult for the Committee and observing NGOs to track which questions have been asked and answered. Committee members often ask their questions in a way that obscures when one question starts and another ends. Sometimes it is unclear if a question has been asked at all. When the states reply to the Committee's questions they often choose to group them according to themes. States also say they will provide written answers to follow-up questions.<sup>39</sup> General questions often also invite general answers, whereas specific questions are met with a mass of information that the Committee cannot fully digest. In this context, specific substantive issues almost always give way to general issues of principle and procedure.

## *2. On matters of law . . .*

Alongside the uncertainty over factual determinations, the jurisprudence of the Committee is notoriously underdeveloped. Although CAT seeks to define the general scope of torture to a greater degree than any other international human rights instrument, there are few explicit statements by the Committee on the nature of treaty obligations. In part this is due to a deliberate case of constructive ambiguity. For example, members argue that they do not want to create a clear distinction between torture and cruel, inhuman, or degrading treatment or punishment (CIDTP), as this will create a line to which states will automatically move towards. By leaving the division between the two categories unclear the Committee has more room to operate. NGOs also criticize the Committee for constantly shifting its jurisprudence, and argue that the Committee makes some claims and drops them later. In general, the Committee members move between narrow and broad interpretations of the Convention. In particular, there is a tension between the use of a specific legal definition of torture that refers directly to the Convention, and a more expansive definition based on what might be called ethical sensibilities. In recent years, for example, several members have started asking questions about domestic violence. Some members welcome this expansion of the Committee's remit and say that although domestic violence may not be strictly covered by the Convention, it is important for the Committee not to be too legally narrow. Other Committee members, however, believe that domestic violence is outside the scope of the Committee's responsibility because it is committed by private actors, not public officials.

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39. There is a formal follow up process through which states are supposed to supply further information within a year on specific points asked for by the Committee its concluding recommendations.



An additional jurisprudential weakness is that many of the members' questions are guided by a general sense of what the members call "the pressing issues" in a specific country, rather than a narrow interpretation of the Convention. The United States, for example, was asked about the response to Hurricane Katrina, while Qatar was asked about the treatment of child camel jockeys. In response, states reject this expansion of the Committee's scope, either by refusing to answer the question, by answering the question while objecting to its scope, or ignoring the question.

The lack of a precise jurisprudence is partially due to the absence of General Comments. The UN treaty monitoring bodies have adopted the practice of publishing their interpretation of the content of human rights provisions in the form of comments on thematic issues. However, whereas the Human Rights Committee had published thirty-one General Comments (including two on torture) by 2007, the Committee Against Torture has only published two General Comments.<sup>40</sup> There are several reasons why the Committee has relatively few General Comments. First, other human rights committees, which are generally much larger, have created sub-committees to draft their comments. The small size of the Committee Against Torture makes this more difficult. An additional reason for the few comments is the inability of the members to agree amongst themselves. The General Comment on Article 2, concerning the responsibilities of states under the Convention, for example, was in preparation for six years. Some members of the Committee complain that their fellow members are too conservative, whereas others argue that their colleagues want to play fast and loose with the Convention.

The jurisprudential uncertainties of the Committee should be understood in the context of a dispute as to the status of the final recommendations produced by the Committee. This dispute exists both within the Committee, and between the Committee and several states. The Committee, as with all human rights treaty monitoring bodies, does not have the explicit power to issue legally binding interpretations of CAT, or even to determine whether states are in compliance with the Convention. Given that absence of authority, most members are hesitant in their jurisprudential claims and frame their arguments in terms of phrasings such as "I wonder if . . .," "in my opinion . . .," or "it could be said that . . .". Most Committee members recognize that their recommendations are precisely that: recommendations, with no binding force. However, many still argue that states have a duty to comply. During the US session some of the members were even more force-

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40. OHCHR, Committee Against Torture, *available at* <http://www2.ohchr.org/english/bodies/cat/comments.htm>.

ful, claiming that “it is our interpretation that will decide whether you are in conformity, not yours . . . one of the parties has to give way, but it will be you, the Committee will have to prevail.” The United States, however, explicitly rejected this view, arguing that “the Convention does not grant the Committee the power to grant legally binding views.”<sup>41</sup> Such rejections of the Committee’s power to determine the interpretation of the Convention are common and states routinely conclude their presentations with the claim that “we are confident that this fulfils our obligations,” implicitly challenging the Committee to disagree.

#### D. The Conclusions and Recommendations of the Committee

Two weeks after a session closes, the Committee releases its conclusions and recommendations. The recommendations are drafted by the Secretariat and signed by the Committee members, with the rapporteurs taking the lead. Although the recommendations are based on the questions and answers given in the session, the Secretariat’s involvement means that the recommendations are often more precise than the questions asked by the Committee members. The Secretariat members often work on several human rights treaty bodies at the same time and have considerable experience. Although the nature of the conclusions and recommendations has changed several times over the years, they take a specific format. Currently they begin with a set of “positive aspects” before moving on to “subjects of concern and recommendations.” Each subject of concern is usually, but not always, matched with a recommendation for paths of action. In practice, such recommendations are often equivalent to saying that the state “should take all necessary steps to combat torture.”

The language of the recommendations makes it clear that they are not obligatory. Most of the recommendations issued by the Committee focus on issues of legislative development or policy and are framed in broad terms. The Committee recommended that Togo, for example, “take the necessary legislative, administrative and judicial steps to prevent all acts of torture and ill-treatment.”<sup>42</sup> When recommendations are more specific they tend to focus on institutional structures. For example, the Committee recommended that several states incorporate torture as a particular crime within their criminal

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41. U.S. Dep’t of State, The United States’ Response to the Questions Asked by the Committee Against Torture, 8 May 2006, available at <http://www.state.gov/g/drl/rls/68562.htm>.

42. *Conclusions and Recommendations: Togo*, U.N. GAOR, Comm. Against Torture, 36th Sess., ¶12, U.N. Doc. CAT/C/TGO/CO/1 (2006). See also *Conclusions and Recommendations: United States of America*, U.N. GAOR, Comm. Against Torture, 36th Sess., ¶26, U.N. Doc. CAT/C/USA/CO/2 (2006).

law.<sup>43</sup> The Committee also suggested, for example, that Peru set up a registry of complaints against law enforcement officials.<sup>44</sup> Very few recommendations refer to specific incidents and at most they refer to general allegations. In its recommendations to Togo the Committee wrote that the “committee is concerned by allegations received . . . of the widespread practice of torture, enforced disappearances, arbitrary arrests and secret detentions.”<sup>45</sup>

It is also very rare for the Committee to tell states to that they are in direct contravention to the Convention. For the United States, the Committee recommended that it “should rescind any interrogation technique, including methods involving sexual humiliation, ‘waterboarding’, [and] ‘short shackling.’”<sup>46</sup> The language is ambiguous as to whether the United States has actually used these techniques and was in direct breach of the convention. Of the seven states that were examined during the May 2006 session, Qatar was the only state that the Committee explicitly told it was in breach of the Convention.<sup>47</sup> The Committee wrote that “[c]ertain provisions of the Criminal Code allow punishments such as flogging and stoning to be imposed as criminal sanctions. . . . These practices constitute a breach of the obligations imposed by the Convention.”<sup>48</sup>

#### IV. UNIVERSALITY IN A WORLD OF UNEQUAL STATES

The Committee members are very aware of their political and institutional weaknesses. As a result a language of “dialogue” predominates during the sessions and the tone of the Committee is one of diplomatic politeness. Members often thank the reporting state for their “interesting and thorough report” and the presence of the “high level delegation.” As the Chair explained, “We need to go softly. We can not throw everything at them. The purpose is not to point fingers but to save lives. . . . We can not demand too much as otherwise they will close the door on us.” The Committee constantly stresses that states need the political will and capacity to reform.

43. See, e.g., *Conclusions and Recommendations: Guatemala*, U.N. GAOR, Comm. Against Torture, 36th Sess., ¶10, U.N. Doc. CAT/C/GTM/CO/4 (2006); *Conclusions and Recommendations: Republic of Korea*, U.N. GAOR, Comm. Against Torture, 36th Sess., ¶4, U.N. Doc. CAT/C/KOR/CO/2 (2006).

44. *Conclusions and Recommendations: Peru*, U.N. GAOR, Comm. Against Torture, 36th Sess., ¶14, U.N. Doc. CAT/C/PER/CO/4 (2006).

45. *Conclusions and Recommendations: Togo*, *supra* note 42, at ¶12.

46. *Conclusions and Recommendations: United States of America*, *supra* note 42, at ¶24.

47. Despite the criticisms of the US contained in the Committee’s Recommendations, at no point did it explicitly state that the US was in breach of the Convention. Human Rights Watch, *U.N. Torture Committee Critical of U.S.*, 18 May 2006, available at <http://www.hrw.org/en/news/2006/05/18/un-torture-committee-critical-us>.

48. *Conclusions and Recommendations: Qatar*, U.N. GAOR, Comm. Against Torture, 36th Sess., ¶12, U.N. Doc. CAT/C/QAT/CO/1 (2006).

The Committee cannot enforce this, but can only encourage it through a careful dialogue.

The focus on dialogue rather than on the strict application of the Convention inevitably raises the issue of whether all states can and should be treated equally. During the sessions, the Committee constantly stresses that "no exceptional circumstances whatsoever may be invoked as a justification of torture." At the same time, however, the Committee recognizes that states have vastly different political and institutional capacities. As one member put it to me in an interview "we can not expect Uganda to implement things in the same way as Norway . . . we must recognize that there are political realities on the ground." Other Committee members criticize this approach, arguing that the Committee must treat all states as equals because they "cannot tell a state they are poor and therefore we will be nice to you."

From this perspective, as the custodian of a UN human rights convention, the Committee has the responsibility to treat all states equally according to universal principles. During the US session in particular, some of the Committee members and NGOs made informal accusations that the United States was given favorable treatment. Others argued that the United States received more scrutiny than it deserved. One leading torture NGO privately criticized the time spent on the US report, arguing that it detracted from the equally grave issues elsewhere in the world. Several members of the Committee recognized that the United States was being held to a higher standard, but did not see this as a problem because as "the most powerful country in the world the US had no excuses" for not implementing the Convention fully. Others saw the issue as one of precedent, arguing that where the United States leads, others would follow. The issue of different levels of engagement cuts both way. For some people, weaker and more unstable states should receive more inspection precisely because they are weaker. For other people, the very same states cannot be expected to meet the same level of commitment precisely because they are weak and unstable.

The Committee constantly moves between a recognition of universal principles and a recognition that not all states can be treated equally.<sup>49</sup> On the one hand, the Committee wants to uphold the universal prohibition of torture as an absolute right. At another level, the Committee recognizes that too narrow of an application of the Convention is counter productive in a world where states have different capacities and the Committee can only persuade, but not force, states to comply with the Convention. In the course of this struggle "developed" states are often subjected to higher standards. During his introductory remarks to the session hearing the report from the

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49. Compare MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2005).

United States, the Committee chair told the US delegation that “we should start by recognizing the unique contribution to human rights of the US . . . but like Caesar’s wife this also creates obligations.” Despite the higher standards, the Committee also assumes that liberal democracies are, in principle, less likely to be in violation of the Convention. This assumption is reflected in the amount of the scrutiny that they give these states. Before the May 2007 session, which was predominately made up of EU states, many of the members openly said that it was going to be a “boring meeting,” as there would not be much to discuss. The Secretariat attempted to shorten the time dedicated to some states, saying that it was pointless to spend all morning on them.

The preferential treatment plays out in the amount of attention given to reporting states. The Committee has discussed whether to make all states report after the same amount of time. Although the Convention stipulates that states must send a report every four years, there is some flexibility in reality because of the extensive delays between a report’s submission and its hearing date. At the same time, the Committee gives less attention to states perceived as less developed. One member of the Committee offered to arrange an interview with me during the Togo session, saying “it is only Togo.” The states in the middle ground, those that profess to be liberal democracies but do not live up to their promises, attract the most attention. This attention is best understood in terms of a broad distinction between principle and evidence. States that are perceived as relatively developed are held to higher standards, but are also seen to be less likely to commit torture. In contrast, states that are perceived as relatively underdeveloped are not expected to reach the same standards, but are assumed to be susceptible to violence against their citizens and subjects. Hence, the Committee displays different levels of evidential trust and perceptions of risk depending on whether it considers a state to be developed or underdeveloped.

## **V. LIBERAL INSTITUTIONS, DEVELOPMENT, AND CIVILIZATION**

In the absence of rigorous jurisprudence and the ability to make factual determinations, the Committee relies on assumed universal values and institutional formations that are traditionally linked to liberal democracies. The grey zone between fact and law is filled with a set of distinctions and judgments, used in both the collection of evidence and in its evaluation, which reproduces an idealized model of the liberal nation state. In this process, the Committee continually distinguishes between developed and underdeveloped states. This distinction is based on assumptions about the universal direction of development and the desirability of particular legal and institutional frameworks as a path to eradicate violence. States that are

seen as lacking these frameworks, such as Qatar, Togo, Peru, Guatemala, and Georgia, are singled out as being in need of “reform” in order to eradicate torture. The Committee told Qatar, for example, that some of its forms of punishment were “anachronistic” and had to be abandoned. Other states are constantly encouraged to strengthen the reform process. In contrast, despite the widespread accusations of torture, the Committee never recommended that the United States reform. Any incidents of torture were treated as a historical aberration for the United States. In large measure the precise notion of development remains vague, but it serves as a pole around which reporting states are conceptually organized by the Committee. From that pole the Committee makes judgments made about the risks of torture. The relative absence or presence of torture is linked to the relative absence or presence of a set of broadly liberal institutions and procedures to which all states should be working towards.

The Committee conceptualizes a state’s development primarily in institutional terms. Crucially, the processes of the Committee are designed to examine compliance with the Convention, rather than to eradicate torture. The object of monitoring is one step removed from the infliction of cruelty. In this process there is a bias towards specific forms of broadly liberal institutional arrangements. At one level the questions and recommendations of the Committee assume a certain level of institutional capacity. For example, they often focus on available statistics as a stable surface against which the possibility of torture can be read. The Committee routinely asks delegations for statistical break-downs by age and gender of prisoner numbers, police killings, torture victims, access to medical care in detention, and sexual crimes, amongst other things. While statistical information is relatively straightforward for many European or North American states, it is beyond many of the states before the Committee.

At another level the Committee assumes that specific liberal institutions are more likely to eradicate torture. Judicial independence, for example, is an area of particular concern. The Committee criticized both Japan and Qatar for not following universal standards for an independent judiciary.<sup>50</sup> The Committee also has great difficulty understanding the implications of the institutional arrangements that differ from the formally liberal frameworks with which they are most familiar. They had problems, for example, in understanding Japanese and Qatari legal systems because they did not fit into the common law or civil law models that most of the members worked within. The status of *shari’a* law in Qatar confused several members of the Committee and much of the session was spent clarifying technical aspects

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50. See, e.g., *Conclusions and Recommendations: Japan*, U.N. GAOR, Comm. Against Torture, 38th Sess., ¶ 13, U.N. Doc. CAT/C/JPN/CO/1 (2007).

of the legal system.<sup>51</sup> One of the Committee members admitted that he had not read the report, but he wanted to know to what extent Islamic law was in force in Qatar. In this process, the Committee treated Islamic law itself as a problem.

A state's development is also often linked to notions of culture. Members discuss the fight against torture as "being fundamentally about changing mentalities." The Qatari delegation, for example, was told that "the eradication of torture began in the minds of . . . officials."<sup>52</sup> The Republic of Georgia was asked to "give higher priority to efforts to promote a culture of human rights."<sup>53</sup> Other states were told to promote the values and practices of democracy.<sup>54</sup> The Committee praised Peru for the "change in values" that had taken place since the previous regime, but explained that there was a further need to "change the culture of the prosecutors."

According to one member, many developing countries "may not know what to do" and it is therefore helpful to be instructed by the Committee. As such, the Committee particularly emphasizes the training of police officers, prison guards, soldiers, lawyers, judges, and the general public. According to the Committee, training can help prevent torture by raising awareness about the Convention. The Committee told the Peruvian delegation that "cultural factors are of vital importance, and therefore we need education." In some cases the Committee explicitly linked the continued presence of torture to inadequate training. The Committee told Togo, for example, that the "numerous reports containing allegations of acts of torture and cruel, inhuman or degrading treatment submitted to the Committee further demonstrate the limited scope of . . . training."<sup>55</sup> Training is seen as necessary for, in the words of one Committee member, a "shift in mentalities," and as such the eradication of torture, is seen as an issue of "cultural change."

Against this background of liberal values and institutions, the distinction between developed and underdeveloped states easily slips into terms of civilized and uncivilized states. The presence of torture is linked to absence of civilization. One Committee member describes the Committee process as being "designed to promote the highest values of civilization and the rule of

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51. See, e.g., *Summary Record of the 707th Meeting*, U.N. GAOR, Comm. Against Torture, 36th Sess., ¶¶ 14, 21, U.N. Doc. CAT/C/SR/707 (2006). Several years previously, the Saudi delegation criticized the Committee for being "unfamiliar with Islamic law." *Summary Record of the First Part (Public) of the 519th Meeting*, U.N. GAOR, Comm. Against Torture, 28th Sess., ¶ 7, U.N. Doc. CAT/C/SR.519 (2002).

52. *Summary Record of the 707th Meeting*, U.N. GAOR, Comm. Against Torture, 36th Sess., ¶ 30, U.N. Doc. CAT/C/SR/707 (2006).

53. *Conclusions and Recommendations: Georgia*, U.N. GAOR, Comm. Against Torture, 36th Sess., ¶ 9, U.N. Doc. CAT/C/GEO/CO/3 (2006).

54. *Summary Record of the 709th Meeting*, U.N. GAOR, Comm. Against Torture, 36th Sess., ¶ 4, U.N. Doc. CAT/C/SR.709 (2006).

55. *Conclusions and Recommendations: Togo*, *supra* note 42, at ¶ 18.



law.”<sup>56</sup> It is not just Committee members that seek to link torture to a notion of civilization. Many states, most notably those accused of lacking modern values, associate themselves with the values of civilization. Additionally, one of the leading anti-torture NGOs argues that “the practice of torture is fundamentally at odds with the notion of civilised life.”<sup>57</sup> Such connections between human rights violations and the absence of “civilization” are common in the UN human rights system. As Rosemary Foot has argued, the new international standard of civilization is partly based around human rights principles.<sup>58</sup> Similarly, Sally Engle Merry has claimed that the UN human rights system operates according to a particular model of a fair society based on what she calls “transnational modernity” that resonates with a colonial era conception of civilization.<sup>59</sup> This model portrays local differences as a challenge to a “universal vision of just society.”<sup>60</sup> The relative absence or presence of human rights as both a value and a practice is linked to the relative absence or presence of civilization.

An approach that links torture to the absence of liberal institutions and cultures relies on particular sociological assumptions about the relationship between institutional forms, values, and the incidence of violence. The Committee, which works with its own version of a “liberal peace theory,” implicitly assumes that states with liberal institutional structures are more likely to comply with the Convention, and that liberal institutions produce liberal practices all the way down.<sup>61</sup> It is implicitly taken for granted that constitutional and legislative reform will lead to changes in practice in prison cells and police stations. The absence of torture is linked to the presence of self-described liberal institutions and values.

The implied link between the absence of torture and the presence of liberalism not only ignores the ways in which liberal politics can produce its own forms of violence, but also reduces violence to an issue of institutional design and cultural values, rather than political and economic inequality.<sup>62</sup> That attitude assumes that violence can be eradicated so long as states

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56. *Summary Record of the 662nd Meeting*, U.N. GAOR, Comm. Against Torture, 34th Sess., ¶11, U.N. Doc. CAT/C/SR.662 (2005).

57. REHAB. AND RESEARCH CTR. FOR TORTURE VICTIMS, *INDEPENDENT MONITORING OF HUMAN RIGHTS PRACTICES IN PLACES OF DETENTION* (2007) (on file with author).

58. ROSEMARY FOOT, *RIGHTS BEYOND BORDERS: THE GLOBAL COMMUNITY AND THE STRUGGLE OVER HUMAN RIGHTS IN CHINA* 11 (2000).

59. Sally Engle Merry, *Constructing a Global Law - Violence Against Women and the Human Rights System*, 28 *LAW & SOC. INQUIRY* 941, 943 (2003).

60. *Id.* at 946.

61. On “liberal peace theory,” see Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT’L L.* 503 (1995).

62. On the violence of liberal democracies, see WALTER BENJAMIN, *Critique of Violence*, in *REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS* 277 (Peter Demetz ed., Edmund Jephcott trans., 1986).

have the correct technical policies, which they strictly follow. Violence that remains after this process, such as the death penalty or mass imprisonment, remains unquestioned or is even normalized. For example, the Committee told the Qatari delegation that its practice of flogging was in contravention to the convention.<sup>63</sup> The Committee told the United States, on the other hand, that it "should carefully review its execution methods, in particular lethal injection, in order to prevent severe pain and suffering."<sup>64</sup>

Cruelty, however, is not merely a residue of some pre-modern and uncivilized past, or an accidental aberration. It can also be an inherent part of modern bureaucratic life.<sup>65</sup> As Darius Rejali has shown, liberal democracies have been at the forefront of the development of torture techniques. Institutions of inspection and accountability that are associated with liberal democracy have not eradicated torture. Instead, those institutions have developed methods of torture that leave no marks and are difficult to monitor.<sup>66</sup> The point here is not the cultural relativist claim that all cultural or political formations are equally valid. Rather, the point is that there is a danger of treating cruelty as a product of a failed modernity, as the result of a cultural void that can only be remedied through the creation of a particular institutional framework. Through the work of the Committee Against Torture, the eradication of violence is close to being seen as solely linked to technical policy formulations.<sup>67</sup> Through a focus on institutions and values a discussion of the causes and consequences of violence is displaced in favor of a discussion of the systems that are supposed to monitor violence.

## VI. CONCLUSION

Human rights monitoring lies at the heart of the UN human rights system. Given that it lacks means of enforcement, the monitoring process is above all a practice of knowledge production. However, monitoring is not a transparent process of information gathering, but can obscure as much as it reveals. Monitoring is a second order process, and the monitoring committee relies on information gathered by states, NGOs, and other parts of the United Nations rather than on direct inspection. It then makes judgments about the dangers presented by particular institutional arrangements. Monitoring is therefore neither neutral nor technical, but is an inherently political process that involves judgments about risk, expertise, and reliability.

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63. *Conclusions and Recommendations: Qatar*, *supra* note 48, at ¶12.

64. *Conclusions and Recommendations: United States of America*, *supra* note 42, at ¶31.

65. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1973).

66. REJALI, *supra* note 17.

67. See also ANGHIE, *supra* note 15, at 165.

The Committee Against Torture creates a form of knowledge about cruelty and suffering that comes from sources that are always one step removed from the infliction of cruelty. In this process debate is shifted away from the direct political causes and consequences of violence to the systems that are supposed to monitor compliance with human rights. Measurement, monitoring, and prevention become merged. The mechanisms used for measuring compliance with the Conventions are in danger of being confused with the practices that will prevent torture. On the one hand, the Committee's limited investigatory powers mean that it is not able to determine issues of fact. On the other hand, its limited jurisprudence means that it does not determine issues of law. In the absence of clear jurisprudence and powers of enforcement, uncertain as to both fact and law, the Committee operates on a grey middle ground that focuses on broad institutional arrangements. This focus is premised on a particular vision of the state and its institutions that reproduces a generalized distinction between developed and underdeveloped nations, and at times between civilized and uncivilized nations. The political nature of violence is ignored in favor of technical policies and procedures. The result is a simultaneous reproduction of political inequalities and a depoliticization of the causes and consequences of cruelty and suffering.

Crucially, these practices of the Committee Against Torture are the result of the institutional weaknesses, political marginalization, and contradictory demands placed on the Committee, rather than a deliberate strategy or philosophy formed by the Committee. Many of Committee members are well aware of the limitations and criticisms of their work, but given their limited institutional resources and mandate they have little space to maneuver.

The enactment of OPCAT in 2006 may alleviate some of these tensions because it will introduce direct and regular inspections focused on prevention of torture. At the time of writing, though, it is too early to clearly assess OPCAT's efficacy. Despite its possibilities, the ratification of OPCAT is limited. The United States and most of the states of the Middle East, for example, are not signatories. OPCAT also considerably overlaps with the European based Council for the Prevention of Torture, making it likely that the focus of OPCAT activities will be outside Europe and North America. Furthermore, the inspection system under OPCAT is still a monitoring system and will still produce information that is removed from the direct infliction of cruelty. The problems of evidence and evaluation will still remain.